No. 76-1602

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

CALIFORNIA, EX REL. DEPARTMENT OF TRANSPORTATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Pursuant to the Federal-Aid Highway Act, 23 U.S.C. 101 *et seq.*, agencies of the federal government and the State of California entered into an agreement for the construction of Interstate Highway 5 in San Diego County, California. As contemplated by the Act, 23 U.S.C. 120(c), the United States agreed to bear 90 percent of the total cost of construction.

In connection with the project, the State incurred an obligation to pay $166.73 in interest with respect to the settlement of an eminent domain proceeding brought for the acquisition of right-of-way for the highway. Under California law, where the value of land taken for a highway is disputed, in order for the State to obtain an order for immediate possession it must deposit with the State

Treasurer an amount equal to the estimated market value of the property. The landowner has the option of withdrawing this money immediately or leaving it with the State Treasurer until after trial. The money draws interest at the annual rate of 7 percent while on deposit. California Code of Civil Procedure, Sections 1243.4-1243.7, 1255b (1972).[1] In this case, the money remained on deposit for approximately thirteen months before withdrawal of the funds by the property owner.

Under the United States Department of Transportation Policy and Procedure Memorandum 80-4, para. 3i[2] (Pet. App. F-4), the federal government reimburses interest payments on money so deposited only for thirty days. Accordingly, the United States reimbursed the State only $12.08, or 90 percent of the interest paid by the State for the first 30 days.

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[1]The federal government and most states follow the general rule that interest does not run on monies on deposit that may be withdrawn by the landowners. Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a; 3 Nichols, *Eminent Domain* §8.63[2] (1976). Our research has discovered no other state statute, and petitioner has cited none, providing for the running of interest on such deposits.

[2]The Memorandum provides:

> i. Federal funds will not participate in any interest payments on the portion of the final settlement or award represented by such partial payment, after the date payment is made available to the property owner with the following exception. Federal participation may be allowed in interest payments for a period of not to exceed 30 days where due to court procedures the deposit cannot be made available to the property owner immediately upon condemnation. Under such circumstances physical possession must not be taken until the deposit is available to the property owner.

The State then instituted this action in the United States District Court for the Eastern District of California under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking reimbursement of an additional $141.42 in interest expense. The district court granted summary judgment for the United States, and the court of appeals affirmed (Pet. App. A, C). The court of appeals noted that acceptance of the State's argument that it was the sole arbiter of what constitutes costs of highway construction would "leave the Federal Treasury at the mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly" (Pet. App. C-4). The court of appeals noted further that 23 U.S.C. 108(a) provides for acquisition of rights-of-way "under such rules and regulations as the Secretary may prescribe" (*ibid.*). Finding the Department's Policy and Procedure Memorandum to be reasonably in accord with and in furtherance of the statutory purpose, the court of appeals held it valid.

The court of appeals was correct in holding that the federal government may make reasonable rules to control the costs of highway construction for which it pays 90 percent. As a general matter, the federal government is empowered "to impose reasonable conditions on the use of federal funds, federal property, and federal privileges." *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295. The Federal-Aid Highway Act authorizes the expenditure of federal funds for the express purpose of facilitating acquisition of rights-of-way "in the most expeditious and economical manner" (23 U.S.C. 108(a)), and the Secretary is generally authorized to "prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title" (23 U.S.C. 315). Further, the Act provides that the Secretary is to establish standards for construction and that construction is "subject to the inspection and approval" of the Secretary. 23 U.S.C. 109.

114. In short, the Act makes clear that the Secretary may provide reasonable, nondiscriminatory rules to control the costs of highway construction and to place reasonable limits on federal participation.

While a state may, if it wishes, permit landowners to deposit monies with it for a time at an attractive rate of interest, the Act does not require the federal government to subsidize that procedure.[3]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.

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[3]Petitioner errs in contending (Pet. 10-11) that United States Department of Transportation Policy and Procedure Memorandum 80-1, para. 3a(2) (Pet. App. F-1), establishes that interest expenses incurred pursuant to state law are reimbursable regardless of their reasonableness. Paragraph 3a(2) expressly provides "except as provided in paragraphs 5i * * *," which in turn provides for federal reimbursement for any expenditure "incident to the acquisition of rights-of-way * * * if reasonable" (Pet. App. F-2). The Department's Policy and Procedure Memorandum 80-4, para. 3i, establishes the pertinent standard of reasonableness. See note 2, *supra*.